fond of society, of yachting, of the opera, of all amusements; he was a capital host, and used to gather at his famous table the brilliant and interesting people of the day. In the street he is said to have appeared "for all the world like a groom taking a holiday," but on the bench his presence was dignified and imposing.

RECENT CASES.

AGENCY — MASTER AND SERVANT. — Plaintiff was sent with a horse by his employer to do work for defendant. He was under the immediate control and direction of the defendant's foreman, and while engaged in the work was injured by negligence of one of defendant's servants. *Held*, that he was not a servant of defendant so as to fall within the fellow-servant rule. *Murray* v. *Dwight*, 44 N. Y. Supp. 234.

The court go on the ground that the defendant did not select and hire the plaintiff, and suggest also that *Quarman* v. *Burnett*, 6 M. & W. 499, indicates that the hiring of the horse with the driver puts the case on a different basis from the hiring of one's servant alone. This suggestion hardly appeals to one's reason, and the dissenting judge seems to take a better view in following *Hasty* v. *Sears*, 157 Mass. 123, and *McInerney* v. *Canal Co.*, 151 N. Y. 411, which hold the fact that the plaintiff was under the defendant's control as to details to be the decisive circumstance in determining their relation. This rule was followed also in a recent Massachusetts case, *Samuelian* v. *American, &c. Co.*, 46 N. E. Rep. 98.

BILLS AND NOTES — DESTROYED NOTE — INDEMNITY. — *Held*, that the holder of a note which is destroyed may recover on the note without giving a bond of indemnity. *Filley* v. *Turner*, 47 Pac. Rep. 1037 (Col.).

It seems reasonable, considering the uncertainty of all proof, to require the plaintiff to indemnify the maker against any possibility of future annoyance or expense in the matter, even where the note is found by the jury to have been destroyed. This is the logical result of the reasoning in *Hansard* v. *Robinson*, 7 B. & C. 90; see Story, Prom. Notes, 5th ed. § 449; and it is the practice in England under 45 and 46 Vict. c. 61, §§ 69 and 70; Byles on Bills, 5th ed., 392, n. It is also the law in a few American jurisdictions. *Welton* v. *Adams*, 4 Cal. 37; *Dumas* v. *Powell*, 2 Dev. & B. Eq. 122; *Irwin* v. *Planters' Bank*, 1 Humph. 145. The weight of American authority is, however, in accord with the principal case. *Sebree* v. *Dorr*, 9 Wheat. 558; *Palmer* v. *Logan*, 4 Ill. 56; *Des Arts* v. *Leggett*, 16 N. Y. 582; *Moses* v. *Trice*, 21 Grat. 556.

BILLS AND NOTES — EXECUTION. — In an action by payee against a surety upon a promissory note, *held*, that the execution of a note includes its delivery, and therefore a denial by a surety of the authority of the maker to deliver the note without the signature of the co-surety is, in substance, a plea of *non est factum*. *Lomax* v. *First Nat. Bank*, 39 S. W. Rep. 655 (Tex.).

The court appears to have reached a sound result on the facts, but the reasoning seems erroneous on principle. The note was in effect delivered to the maker in escrow, and then in breach of the condition delivered to the payee. But it is difficult to see how it can be said that there was no delivery, and that the two essentials of execution, signing and delivery, were not present. The correct theory in such cases is that there is due execution, but that such an agreement as was made here may be a personal defence, effective, as in this case, because the payee had notice, and that the plea is an equitable one, and not *non est factum*. On the principles adopted by the court, the settled law, that if plaintiff here had had no notice or had been a *bona fide* vendee of the payee, he could have recovered, can be worked out only on the theory that the defendant would have been estopped to deny execution. But this would throw the burden of establishing *bona fides* and value on the plaintiff, whereas it should rest upon the defendant, who seeks to avoid the effect of execution; and this is a very practical objection to such a theory. See *Marston* v. *Allen*, 8 M. & W. 494; *Bell* v. *Viscount Ingestre*, 12 Q. B. 317, for forms of pleas in cases of indorsements under like circumstances.

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS — A statute of Texas provided that life insurance companies failing to pay a loss within the time specified in the policy should be liable to pay the holder twelve per cent of the amount of the loss,

in addition thereto, and a reasonable attorney's fee for the collection of the loss. *Held*, this statute is constitutional. *Fidelity & Casualty Co. of N. Y.* v. *Allibone*, 39 S. W. R. 632 (Tex.).

In *Ry. Co.* v. *Ellis*, 17 Sup. Ct. Rep. 255, a Texas statute providing for the imposition of $10 extra costs on railroads resisting the payment of certain claims, was declared unconstitutional by the United States Supreme Court. See 10 HARVARD LAW REVIEW, 524. The court in the present case allude to this federal decision, and admit that the statute there declared unconstitutional is analogous to the one before them. They say, however, that they are not obliged to follow that case except when the same facts are presented, and assert that in their opinion the State legislation is valid. It would seem that there may well be a rational basis for the class legislation in the principal case, and consequently the Texas decision is to be preferred to that of the Supreme Court of the United States.

CONSTITUTIONAL LAW — EX POST FACTO LAWS — THE POLICE POWER. — A statute provided that no person should practice medicine in the State who had ever been convicted of a felony. *Held*, that the statute applied to persons who had been convicted before its passage, and as to such of them as were not at the time engaged in the practice of medicine, was not invalid as an *ex post facto* law. *People* v. *Hawker*, 46 N. E. Rep. 607 (N. Y.). See NOTES.

CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — TAXATION. — *Held*, that a statute exempting from taxation city waterworks is invalid, being the exemption of an enterprise which is not of a public nature. Those only are public purposes which relate to the government of a city, and not those which are but incidentally beneficial to the citizens. *City of Covington* v. *Commonwealth*, 38 S. W. Rep. 826 (Ky.).

What is within a public purpose is perhaps best regarded as a question for the legislature, and their decision should not be set aside unless clearly an error. *Perry* v. *Keene*, 56 N. H. 514. Thus, the courts have generally regarded a railroad as within a public purpose. *Ry.* v. *Otoe*, 16 Wall. 667. But they have considered manufacturing institutions too far over the line to admit of exemption from taxation. *Loan Assoc.* v. *Topeka*, 20 Wall. 665. It is difficult to reconcile the principal case with these views. It is true that a city can have inviolable private rights apart from its governmental functions; 1 Dillon on Municipal Corporations, 4th ed., §§ 66 *et seq.*; and it has been held, as in *Weston Sinking Fund Soc.* v. *Penna.*, 31 Pa. St. 183, that a city can own and operate business enterprises as an individual. But though a city waterworks company might not be a public business in the sense of being under the absolute control of the legislature, it is difficult to see how an enterprise belonging to the city, and therefore contingently dependent upon local taxation for support, can be so clearly without a public purpose as to warrant a decision that its exemption by the legislature is invalid. The decision, however, is in accord with earlier Kentucky decisions. *Commonwealth* v. *Makibben*, 90 Ky. 384.

CONTRACTS — ANTI-TRUST LAW. — *Held*, that the Act of July 2, 1890, known as the Anti-Trust Law, providing that every contract in restraint of trade among the several States shall be illegal, applies to a contract between competing common carriers by rail, forming an association for the purpose of maintaining and regulating rates, whether such contract would have been legal or illegal at common law, and whether the restraint thereby put on trade is reasonable or not. *United States* v. *Trans-Missouri Freight Association*, 17 Sup. Ct. Rep. 540; White, Field, Gray, and Shiras, JJ., dissenting.

A discussion of this extremely interesting decision, which is of extraordinary practical importance, will be found among the leading articles in this number of the REVIEW.

CONTRACTS — INSTALMENTS — IMPOSSIBILITY OF FULFILMENT. — A contracted to put in an elevator for B for $2,500, one half to be paid when the engine was on foundation and the rest when the whole was completed. Soon after the engine was on foundation the building was burned. *Held*, that A could recover the first instalment, but could get nothing for what was done after the first instalment was earned. *Siegel* v. *Eaton & Prince Co.*, 46 N. E. Rep. 449 (Ill.).

There can be no doubt of the correctness of the first part of the decision. A right of action for the first instalment had accrued, and there is no good reason why the later destruction of the property should discharge the defendant. The second part follows the English law, but is rather against the weight of American authority. It seems, however, correct on principle. Recovery for the later work must be in quasi-contract, but the whole doctrine of quasi-contracts is grounded on benefit to the defendant, and here the defendant apparently received no benefit whatever. Accidental destruction of the building should excuse the plaintiff from further performance, but

should give him no right of action for work, labor, and materials. See Keener on Quasi-Contracts, 253 *et seq.*

CONTRACTS — INSURANCE — PROVISION FOR ARBITRATION. — The rules of an accident insurance association provided that all matters in dispute should be submitted to the superintendent, whose decision should be final, subject to appeal to the advisory board, whose decision should be absolutely final. *Held*, that a member could recover insurance for injuries received, although his claim had been duly considered and rejected by the superintendent, and no appeal had been taken. *Voluntary Relief Dept.* v. *Spencer*, 46 N. E. Rep. 477 (Ind.).

The statement of the court that no appeal need be taken before bringing action seems quite inconsistent with *Supreme Council* v. *Forsinger*, 125 Ind. 52. The whole subject of provisions for arbitration is in a chaotic condition, but the jealousy of the courts towards such provisions seems to be breaking down. There seems no good reason on principle why the parties to a contract may not provide that all questions of fact at least, arising fairly and directly out of the contract, should be determined by arbitrators, whose decision on all questions properly before them should be accepted and enforced by the courts, in the absence of proof of fraud or evident mistake. The contract would still involve questions enough for the courts, and their jurisdiction would not be interfered with to any injurious extent.

CONTRACTS — VALIDITY — APPEAL. — *Held*, that a contract whereby one partner sells to another all his interest in the furniture and stock in their saloon, including the license held by the seller, is not void because the transfer of the license is illegal, since the legal consideration is distinguishable from the illegal, and is sufficient to uphold the contract. *Pierce* v. *Pierce*, 46 N. E. Rep. 480 (Ind.).

This case, although following an earlier one in the same State (*Strahn* v. *Hamilton*, 38 Ind. 57), does not seem to be sound. The consideration in this case is so unified that the attempt to separate it into its legal and illegal elements can find little support. The sale of the license was the foundation of the whole contract, and the extremely important point that without it the stock in trade was practically valueless does not receive from the court the attention which it merits. Cases where the consideration was apparently much more separable, but which have nevertheless been decided the other way, are numerous. *Edward Co.* v. *Jennings*, 35 S. W. 1053 (Tex.); *Bishop* v. *Palmer*, 146 Mass. 469; and *Bliss* v. *Negus*, 8 Mass. 46, are particularly in point.

CORPORATIONS — RECEIVERS — LIABILITY ON CONTRACTS OF COMPANY. — *Held*, that the receivers of a railroad company are not liable for their refusal to carry plaintiff on a ticket issued by the company before the receivership. *Casey* v. *Northern Pacific R. R. Co.*, 48 Pac. Rep. 53 (Wash.).

A receiver does not stand in the place of the corporation or person over whom he is appointed, but is an arm of the court to administer the assets for the benefit of all who are interested in the property. As such he cannot pay debts incurred by the corporation unless they constitute a lien on the property, and he cannot be compelled to carry out the contracts of the company unless he has accepted some benefit therefrom, in which case he will be liable *pro tanto*. That the plaintiff has already paid money for the ticket does not give him any greater right to call on the receiver to honor the ticket. It merely gives him a right to come in as a general creditor for the price of the ticket. A similar case was *Central Trust Co.* v. *M. & N. G. Ry. Co.*, 51 Fed. Rep. 15, where freight money paid to the company was held not to entitle the plaintiff to sue the receiver for refusal to carry the goods.

CRIMINAL LAW — CONSPIRACY — OFFICERS OF CORPORATION. — The officers of a corporation are not, as regards their criminal liability, a single person in respect to corporate acts, and therefore they may be guilty of conspiracy therein. *People* v. *Duke*, 44 N. Y. Supp. 336.

The exact limits of the criminal liability of corporations are not, perhaps, as yet so clear as could be desired, although they may plainly be liable for some sorts of crimes, particularly those created by municipal regulation, where the doctrine of criminal intent plays no part, and others of similar nature. *Reg.* v. *Great North Ry. Co.*, 9 Q. B. 315; *Rex* v. *Medley*, 6 C. & P. 292. It is to be noticed, however, that the present case does not specifically decide that the corporation, as such, may not be liable, but holds that the individual members of it may also be. This seems correct on principle. There is no reason in the nature of things why an individual cannot be guilty of a particular crime, whether or not the corporation of which he is a member is also guilty. The implication of an earlier New York case, *People* v. *England*, 27 Hun, 139, seems in line with this view.

CRIMINAL LAW — SALE OF LIQUOR WITHOUT LICENSE — BURDEN OF PROOF. — *Held*, that, under an indictment for selling liquor without a license, the burden is on defendant to show that he had a license. *State* v. *Shelton*, 48 Pac. Rep. 258 (Wash.).

This decision is against the general rule, that in a criminal prosecution the State must prove all the essential elements of its case; it is, however, supported by an overwhelming weight of authority, though in Kansas and North Carolina it has been held that the State has the burden of proof as to the non-existence of a license, and in Wisconsin that it has the burden of going forward with evidence. The rule putting the burden of proof upon the defendant is based on very obvious considerations of public policy and convenience. It is hard to prove a negative, and the subject matter is peculiarly within the knowledge of the defendant, and if he has a license he can easily show it. See 1 Greenl. Ev. § 79; Black, Intox. Liq., § 507.

DAMAGES — AVOIDABLE CONSEQUENCES. — A wrongfully dug ditches on B's land while A held it as tenant. The cost of filling the ditches was less than the depreciation in the value of the land would be if the ditches were allowed to remain. *Held*, that the measure of damages was the cost of filling the ditches. *Doss* v. *Billington*, 39 S. W. Rep. 717 (Tenn.).

It must be assumed that the action is brought after the termination of the tenancy, for it would be difficult to find any damage to the reversion so long as the tenant could fill the ditches. The court discuss the case as though it were one of the class illustrated by *Brewing Co.* v. *Compton*, 142 Ill. 511, which was an action for a nuisance caused by water dripping from defendant's eaves on plaintiff's property. But such an action is based on a wrongful act, "giving rise to a continuous series of torts which can be brought to an end by the defendant discontinuing the act." 1 Sedg. Dam., 8th ed., § 91. The principal case falls rather into the class in which the action is for a single tort of the defendant, further damage from which can be prevented by plaintiff, and hence will be regarded as the result of his own negligence if not avoided. *Loker* v. *Damon*, 17 Pick. 284. If the cost of filling exceeded the depreciation in value, the latter would probably be the measure of damages, for it would not be reasonable ordinarily to endeavor to avoid a small loss by incurring a larger one. *Le Blanche* v. *L. & N. W. Ry. Co.*, 1 C. P. D. 286.

EVIDENCE — COLLATERAL WRITINGS. — *Held*, that parol evidence is admissible to prove the contents of writings which are merely collateral to plaintiff's cause of action. *Engel* v. *Eastern Brewing Co.*, 44 N. Y. Supp. 391.

The distinction between the manner of proving the contents of writings which are the foundation of a claim, and those which are merely collateral to it, is everywhere recognized. *Coonrod* v. *Madden*, 126 Ind. 197. But the reasons for the distinction are not often clearly stated. The explanation is thought to lie in purely practical considerations. Where a writing is fundamental, it is right to require that it should be produced, or a valid excuse shown; but where the writing is merely collateral, it is asking too much to require a party to produce it, because, such matters being likely to come up unexpectedly, he cannot fairly be supposed to have it within reach.

EVIDENCE — PRESUMPTION AS TO FOREIGN STATUTES. — *Held*, that, where the statutes of another State are not introduced in evidence, they will be presumed to be the same as the statutes of the State in which the action is brought, upon the same subject. *Scott* v. *Beard*, 47 Pac. 986 (Kan.).

The language of the principal case, though often repeated, is inaccurate. The question is not one of presumption, but of judicial notice. When the parties lay their case before the court of a State, that court must try the case by the law which it knows judicially. If one of the parties wishes to rely on a statute or an interpretation of the common law obtaining in another State, he must allege and prove it like any other fact. That is all the court means in its decision, and to express in terms of presumption the well settled doctrine that a court does not take judicial notice of foreign law is misleading.

EVIDENCE — PRIVILEGED COMMUNICATIONS — ATTORNEY AND CLIENT. — *Held*, that directions given to an attorney as to the drawing of a deed are not privileged communications. *Sommer* v. *Oppenheim*, 44 N. Y. Supp. 396.

In the earlier cases on this subject, it was thought that only such communications were privileged as were made to the attorney with regard to a suit pending or in contemplation. But the courts soon did away with this restriction, and extended the privilege to communications made during a consultation with the attorney as to the rights and liabilities of the client, though no suit was in contemplation. *Greenough* v. *Gaskell*, 1 Myl. & K. 98. On the same principle, the better doctrine would seem to be that communications made to an attorney with regard to drawing up a deed are privileged. *Parker* v. *Carter*, 4 Munf. (Va.) 273.

INTERNATIONAL LAW — FORFEITURE OF VESSEL. — *Held*, that under Rev. Sts. § 5283, forbidding the fitting out of a vessel "to be employed in the service of any foreign prince or of any colony, district, or people," against a government with which the United States are at peace, a vessel fitted out to be employed in the service of the Cuban insurgents against the King of Spain, although such insurgents had not been recognized as belligerents, was properly forfeited. Mr. Justice Harlan dissenting. *The Three Friends*, 17 Sup. Ct. Rep. 494. See NOTES.

PRACTICE — COSTS — NEW TRIAL FOR NOMINAL DAMAGES. — In a libel suit, under instructions of the judge, plaintiff was entitled to nominal damages. The jury found for the defendant, and judgment was rendered on the verdict, carrying a bill of $800 costs against plaintiff, including an extra allowance. A new trial was refused. On appeal, the extra allowance was struck out, but *held* that where the mere question of costs is involved, a new trial will not be granted because the jury found for the defendant instead of giving nominal damages to the plaintiff. *Funk* v. *Evening Post Pub. Co.*, 46 N. E. Rep. 292 (N. Y.).

In New York, a plaintiff in a libel suit, on final judgment in his favor, is entitled to costs; but where the damages are less than $50, the costs must not exceed the damages. N. Y. Code Civ. Proc., § 3228. Under this provision it seems that the principal case denies the plaintiff a substantial right important to him in avoiding costs. *Eaton* v. *Lyman*, 30 Wis. 41; *Potter* v. *Mellen*, 36 Minn. 122; *Leat & Robinson* v. *Moreland*, 7 Humph. 675. In spite of the statute, the case represents the New York law as it has stood for almost a century; see *Stephens* v. *Wider*, 32 N. Y. 351, where the court speaks of the New York rule as a salutary one, preventing useless and vexatious litigation. The criticism in Sedgwick on Damages, 8th ed., 154, of the general rule to the contrary, as engendering litigation, may be just, and the New York rule salutary, but it seems to be a matter for the legislature to deal with rather than the courts.

PROPERTY — CANCELLATION OF COVENANTS. — A conveyed to B with warranty; B reconveyed to A with like warranty. *Held*, that the covenants are mutually cancelled, and a purchaser from A cannot sue B for a defect in title existing before A's deed to B. *Green* v. *Edwards*, 39 S. W. Rep. 1005 (Tex.).

Wherever this question has arisen it has been decided as above since the Year Books; Rawle on Covenants, 5th ed., § 223. The reason for this is not clear. If B's only object was the mutual cancellation of covenants, he proceeded in an awkward manner. An arbitrary line is drawn by this case, for a covenant not to sue one of two joint specialty obligors does not operate as a release, "for it is only a covenant," although an actual release of one releases all. *Lacy* v. *Kingston*, 1 Ld. Raym. 688. The principal case seems to contain "only a covenant." The reason given for the principal decision is that it prevents circuity of action, and, in fact, it seems to be the result of the unconscious application of this equitable doctrine by the common law courts. Cf. *Kellogg* v. *Wood*, 4 Paige, 578, 615; Platt on Covenants, 593. But circuity of action is a defence only between A and B in the principal case, primarily for the protection of the court, and unlike fraud, which may vitiate the contract in a subsequent party's hands. Compare the case of the transfer and retransfer of negotiable paper, where a subsequent holder may sue on the indorsements, though the circuity of action is apparent on the paper.

PROPERTY — DEED — DELIVERY. — A grantor signed and sealed a deed of gift and delivered it to a deputy recorder with instructions to register it, intending at the same time that title should pass to the grantee. Before the deed was recorded, the grantor recalled it, the grantee knowing nothing of the deed until after the recall. *Held*, that title passed to the grantee on the delivery of the deed to the deputy, since the delivery was complete. *Robbins* v. *Rascoe*, 26 S. E. Rep. 807 (N. C.).

The cases which hold that a grantee may presumptively accept a benefit, although unknown to him at the time, lay down the better working rule and at the same time represent the numerical weight of authority; *Mitchell* v. *Ryan*, 3 Ohio St. 377; the contrary view, however, is ably maintained in *Welch* v. *Sacket*, 12 Wis. 243. The delivery to the deputy in the principal case appears to have been an absolute one, since he intended to pass title, and hence the delivery was irrevocable. The fact that the deed had not been recorded should not alter the case. The true test is whether the grantor had put the instrument out of his control. *Phillips* v. *Houston*, 5 Jones (N. C.), 302. But if the grantor retains control over the deed in any way, even the registry of a deed, although strong evidence of a delivery, may be rebutted. *Maynard* v. *Maynard*, 10 Mass. 456; *Mitchell* v. *Ryan*, *supra*.

PROPERTY — REVIVAL OF DEBT BY EXECUTOR. — *Held*, that a promise by an executor, made after the statute has run, cannot revive a debt against the estate.

Dictum, that a promise by an executor during the running of the statute will not bind the estate. *Balz* v. *Underhill*, 44 N. Y. Supp. 419.

Both the decision and the *dictum* seem sound, though directly opposed to *Johnson* v. *Beardslee*, 15 Johns. 3 (not cited in principal case). The law on the subject of revival, especially by executors, is in great confusion, owing to the misconception of the statute by the English courts, especially in Lord Mansfield's time, as harshly depriving creditors of their just dues. The statute is really one of repose, based on sound public policy; Story, J., in *Bell* v. *Morrison*, 1 Pet. 360, 363. As matter of law, a man who has made a new promise before or after the statute has run may be charged, in fact, though not necessarily in pleading, as on a new contract based on the original consideration. Banning, Law of Limitations, 2d ed., pp. 46, 47; Buswell, Limitations and Adverse Possession, 59, 60. This is all very well as to the debtor, but when it comes to charging the estate on the executor's promise a difficulty arises. If the estate is charged on the theory of a new contract, the court is met by the established rule that an executor has no power to bind the estate with contracts; on the other hand, the doctrine of a continuation of the original promise is now discarded as a ground of decision against the debtor himself. *Fritz* v. *Thomas*, 1 Whart. 66, and authorities *supra*. The decision and suggestion in the principal case avoid this dilemma, besides appealing to common sense. Even if the new promise of a debtor is regarded as a waiver of a defence, as perhaps it should be, there seems to be no reason for allowing an executor to waive this defence, so causing loss to the other creditors.

PROPERTY — RIGHTS OF ABUTTERS TO ACCESS — INJUNCTION. — A bill, filed by a hotel keeper, alleged that the defendant, by allowing his hacks to stand in front of the plaintiff's hotel, obstructed the guests in their reasonable access to the hotel, to the injury of the plaintiff. *Held*, that an injunction should be granted. *West* v. *Brown*, 21 So. Rep. 452 (Ala.).

The case is undoubtedly right; a carriage driver may stop before the house of another so long as his use of the street is reasonable. He must move if not actually engaged in leaving or receiving passengers or baggage, if asked to, or even without being asked, if it is clear that he is in the way. The abutter has a primary right to use the street on which he abuts, for reasonable access and egress. The carriage has a right to be there, moving out of the way when impeding access. If the obstruction is subsisting, equity will relieve by injunction. *Original Hartlepool Co.* v. *Gibb*, 5 Ch. D. 713.

PROPERTY — RIPARIAN LAND — ADVERSE POSSESSION. — The defendant obtained, by adverse possession, land bounded by a stream. *Held*, that he did not acquire title constructively to the middle of the stream. *Stanberry* v. *Mallory*, 39 S. W. R. 495 (Ky.).

The rule that, where a grant is made of land bounded by a stream, the grant extends to the middle of the stream, was properly held not to be applicable to land acquired by adverse possession. In order to hold adversely land not actually occupied, a good paper title must be shown in addition to the land constructively claimed being reasonably appendant to that actually occupied. *Jackson d. Gilliland* v. *Woodruff*, 1 Cowen, 276. *Doe* v. *Campbell*, 10 John. 156. *Simpson* v. *Downing*, 23 Wend. 316. The Statute of Limitations does not aid the claimant, as no action could have been maintained against him for the bed of the stream, since he did not occupy it. If his claim had been based on the fiction of a lost grant, the result would be the same. *Corning* v. *Nail Factory*, 34 Barb. 529.

PROPERTY — TAXATION OF COLLEGE DWELLING-HOUSES. — The officers of a college occupied dwelling-houses owned by the college, for which they paid rent, and which they exclusively controlled. *Held*, that the property was not exempted from taxation by a statute exempting from taxation real estate of a college when occupied by it or its officers for the purposes for which it was incorporated. *Williams College* v. *Williamstown*, 49 N. E. R. 394 (Mass.).

The case is perhaps of more practical than legal importance. The principal followed is well established; it is not enough that the income of the property is applied for the purposes of the corporation, but the real estate must itself be occupied for these purposes. *Mt. Hermon Boys' School* v. *Inhabitants of Gill*, 145 Mass. 148. It is immaterial that no rent is paid. *Third Congregational Soc.* v. *Springfield*, 147 Mass. 396.

PROPERTY — WATERCOURSES — DRAINAGE. — Defendant drained surface water by ditches into a stream on his own land, so that it overflowed on plaintiff's land. *Held*, that he may do so though it damages plaintiff's land. *Mizell* v. *McGowan*, 26 S. E. Rep. 783 (N. C.).

This rule is followed in some States; *Hughes* v. *Anderson*, 68 Ala. 280; *Peck* v. *Herrington*, 109 Ill. 611; and is supported by the fact that it facilitates the reclaiming

of swamp lands. But it is hard to see how civilization is advanced by allowing one man to drain his swamp at the expense of another's meadow, and the doctrine that a landowner may not so drain his lands as to overtax the capacity of a stream and flood lands below him, seems sounder. *Noonan* v. *City of Albany*, 79 N. Y. 470, cited with approval in *McCormick* v. *Horan*, 81 N. Y. 86.

TORTS — ABUSE OF LEGAL PROCESS. — *Held*, that, if a person causes a subpœna to issue against another for the alleged purpose of securing his attendance as witness in a case, but in reality only in order to compel him to pay a claim, this is an abuse of legal process for which the party against whom the subpœna is issued can recover damages. *Dishaw* v. *Wadleigh*, 44 N. Y. Supp. 207. (See NOTES.)

TRADE-MARKS — ASSIGNABILITY OF ORCHESTRA NAME. — A organized a band of musicians called the "Fadette Ladies Orchestra." She sold to plaintiff her rights in the organization, together with right in the name. On a bill to enjoin the use of a similar name by defendants, *held* that, so far as A had any right in the trade-name, it was personal to herself, depending upon her personal reputation and skill, and it was not assignable. "It is well settled that the courts will not enforce a claim of this kind which contains a misrepresentation to the public." Lathrop, J. dissenting. *Messer* v. *The Fadettes*, 46 N. E. Rep. 407 (Mass.).

The general principle asserted by the majority is clearly correct, for plaintiff must come into equity with clean hands. But it is difficult to see any misrepresentation here. If the name had been "A's Orchestra," implying her connection with it, it might be argued that its use by an assignee would misrepresent. But the name actually used seems to imply a musical organization only, and if the court mean to assert as a broad doctrine that in no case can such a name be assigned, it would seem an unfortunate decision. It is difficult to distinguish such a name from any business name, as, for instance, that of a hotel, which becomes of great value, if at all, through the personal reputation and skill of its founder. Yet hotel names are clearly assignable. *Wood* v. *Sands*, Cox, Man. Trade-Mark Cas., No. 467.

TRUSTS — BONA FIDE PURCHASE AT EXECUTION SALE. — *Held*, a *bona fide* purchaser of land at a foreclosure sale, who pays the price and takes the certificate of sale, is not affected by subsequent notice of equities, though received before the execution of the sheriff's deed. *Duff* v. *Randall*, 48 Pac. Rep. 66 (Cal.).

By the California statute, a purchaser at an execution sale acquires the title of the judgment debtor, subject to redemption within six months, at the expiration of which time he is entitled to a sheriff's deed. Cal. Code Civ. Proc., §§ 700-703. The principal case is right; Freeman on Executions, 2d ed., § 336; and it presents an interesting analogy to the case of the transfer of stock certificates where notice of equities is given before the transfer on the company's books, a case as to which the law is not yet generally settled. In considering this analogy, it is to be remembered that the sheriff occupies two positions, — one analogous to that of the assignor of stock, and the other to that of the stock company. Both in the case of the stock certificate and in that of the sheriff's certificate the assignor has done all that is required of him; in both cases the assignee has gained a right to the performance of an affirmative legal duty, in the one case by the sheriff, in the other by the company. It is not a mere equity; it is a legal right, and so is not affected by subsequent notice. Lowell, Transfer of Stock, § 99; 1 HARVARD LAW REVIEW, 5, 6; Ames's Cases on Trusts, 2d ed., p. 299, note.

TRUST — CONSTRUCTIVE TRUST. — A gave her husband, X, money to invest in a lot for her. X added money of his own, and purchased, taking title, without knowledge of A, in his own name. The lot, at A's request, having been sold, a second lot, of her own selection, was purchased with X's own money, he again taking title. With further funds furnished by A, in belief of ownership in the lot, X built a house thereon. *Held*, that A's rights in equity were inferior to those of a subsequent levying creditor of X. *Clark* v. *Timmons*, 39 S. W. Rep. 534 (Tenn.).

The decision is indefensible. Although no direct authority is to be found, a judgment creditor in Tennessee seems to have only the rights of his debtor, and not those of a purchaser. It follows that the court errs in two respects. First, it assumes that X owned the second lot free from equities, because it was not purchased with any of the proceeds of the first, to which equities were attached. But if a fiduciary appropriates funds of his own in the purchase of property to replace the original trust property, he will hold the latter upon the original trust. *Houghton* v. *Davenport*, 74 Me. 590; *Perkins* v. *Perkins*, 134 Mass. 441; *Van Alen* v. *Am. Bank*, 52 N. Y. 1; *Baker* v. *N. Y. Bank*, 100 N. Y. 31. Secondly, even upon the assumption that the lot was the trustee's own, if a fiduciary employs a trust fund in improving his own estate, the *cestui* has a lien for the amount misapplied, so far as it is traceable in the improvements.

2 HARVARD LAW REVIEW, 28; *Dyer* v. *Jacoway*, 42 Ark. 186; *Burt* v. *Timmons*, 29 W. Va. 441; *Brazel* v. *Fair*, 26 S. C. 370; *Cavin* v. *Gleason*, 105 N. Y. 256; *contra*, *Cross's Appeal*, 97 Pa. 471. The case is decided upon "the familiar rule that a trust must result, if at all, at the instant the legal title vests in the grantee, and the use of the money was subsequent to the conveyance of the lot." One citation from Perry on Trusts is the authority for this "familiar" rule. But there is to-day a well recognized doctrine of constructive trusts, one species of which is the so called "resulting trust."

REVIEWS.

DOMESDAY BOOK AND BEYOND: Three Essays in the Early History of England. By Frederic William Maitland, LL.D. Cambridge (Eng.) and Boston. 1897.

We might hardly have known, but for Professor Maitland, that a book may contain between its two covers both good law and good literature, — not in several parcels, but *per my et per tout.* Each new book of his makes this delightful truth the plainer. With his latest work he enters the common ground, the *mark*, of three sciences; for history, economics, and law are alike interested in the field he is tilling, and his results are of high importance to the student of each science. The history, the economy, and the law of the old English boroughs, vills, and manors must henceforth be studied with Professor Maitland's arguments and conclusions in mind. It is, however, the interest of the lawyer in this work that we must chiefly emphasize.

This is an introduction to Pollock and Maitland's already classic History of English Law; though, like many introductions, it is most profitably read, as it was published, after that to which it leads. It has the good qualities, both legal and literary, of the larger work; though it must be confessed that its conclusions are oftener reached by enlightened guess-work since less evidence is at hand.

The student of legal history will here find our land law in the making. He is familiar with the process in other branches of the law. The law of torts, for instance, has become a body of legal principle before his very eyes, wrought out of a few original writs and an enlightened statute by courts whose decisions are found in modern reports. In the law of torts the process is almost finished, in the law of contracts it is hardly begun. Each contract is still treated as an independent obligation, subject to few general rules after it has once come into being; one can still oblige himself as he will. The premature attempt of Lord Holt and Sir William Jones to force bailments into a Procrustean bed utterly failed. But the law of real property seemed to have been wrought into an absolute uniformity in the prehistoric time of our law. Tenures when we first knew them were fixed and few; servitudes were conformable to known types, and novel ones could not be created; manors had a rigid organization; ranks of men had established rights; and seignorial justice appeared to be a settled institution. Even equity, which still sometimes gives effect to special agreements touching land, will not go far afield. But in this study of Domesday Book, and the "beyond" which came before it, we see a state of affairs where every dealing with land was special, tenures were as various as tenants, and freedom and slavery were relative terms. We see how entire freedom of contract in dealing with land resulted in